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YEAR after year, the volume of reported appellate decisions in California grows. This growth results in a need for massive libraries, containing many decisions which are of little, if any, value to attorneys and the courts. Since 1964, however, a dramatic curtailment in the publication of California appellate court opinions has occurred. This is the direct result of the supreme court's adoption of Rule 976 of the California Rules of Court.[1] Pursuant to this rule, 11,218 or 58 percent of the 19,332 written opinions of the courts of appeal have been certified for non-publication.[2] The percentage of unpublished opinions is growing—71 percent in fiscal year 1971.[3] Current revisions to

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1. See note 4 *infra.*

2. Appellate opinions certified for nonpublication:

Fiscal Year	Number of Written Majority Opinions	Number Certified For Nonpublication	%	%-Civil	%-Criminal
1964-1965	1,779	953	53	*	*
1965-1966	2,095	1,153	55	40	70
1966-1967	2,371	1,266	53	40	72
1967-1968	2,811	1,414	50	39	63
1968-1969	3,146	1,721	55	43	68
1969-1970	3,384	2,054	61	50	74
1970-1971	3,746	2,657	71	62	82
	19,332	11,218	57		

*Not given

CAL. JUDICIAL COUNCIL, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 191 (1967), 71 (1968), 128 (1969), 87 (1970), 98 (1971), 76 (1972).

3. *Id.* at 76 (1972).

the rule—in effect since January 1, 1972—promise that even fewer opinions will reach publication in the future.[4]

While a reduction in the volume of reported decisions promotes judicial economy, the concomitant increase in the body of unreported decisions has raised two important and, at this point, troubling questions. These involve the effect which the courts should give an unreported decision and the use which the profession should make of such

4. Text as revised, CAL. R. CT. 976:

"Rule 976. Publication of Appellate Opinions

"(a) [Supreme Court] All opinions of the Supreme Court shall be published in the Official Reports.

"(b) [Standard for opinions of other courts] No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule,[1] (2) involves a legal issue of continuing public interest,[2] or (3) criticizes existing law.[3] [As amended effective Jan. 1, 1972; previously amended effective Nov. 11, 1966.]

"(c) [Courts of Appeal and appellate departments] Unless otherwise directed by the Supreme Court, an opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports if a majority of the court rendering the opinion certifies prior to the decision becoming final in that court that it meets the standard for publication specified in subdivision (b). An opinion not so certified shall nevertheless be published in the Official Reports upon order of the Supreme Court to that effect. [As amended effective Jan. 1, 1972; previously amended effective Nov. 11, 1966.]

"(d) [Superseded opinions] Regardless of the foregoing provisions of this rule, no opinion superseded by the granting of a hearing, rehearing or other judicial action shall be published in the Official Reports. [Renumbered effective Jan. 1, 1972.]

"[1]This criterion calls for publication of the relatively few opinions that establish new rules of law, including a new construction of a statute, or that change existing rules. This criterion does not justify publication of a fact case of first impression, where a legal rule or principle is applied to a substantially new factual situation.

"[2]This criterion requires that the legal issue, rather than the case or controversy, be of public interest and that the interest be of a continuing nature and not merely transitory. Public interest must be distinguished from public curiosity. The requirement of public interest may be satisfied if the legal issue is of continuing interest to a substantial group of the public such as public officers, agencies or entities, members of an economic class, or a business or professional group. An opinion which clarifies a controlling rule of law that is not well established or clearly stated in prior reported opinions, which reconciles conflicting lines of authority, or which tests the present validity of a settled principle in the light of modern authorities elsewhere may be published under this criterion if it satisfies the requirement that the legal issue be of continuing public interest.

"[3]This criterion would justify publication of the rare intermediate appellate opinion which finds fault with existing common law or statutory principles and doctrines and which recommends changes by a higher court or by the Legislature."

The major changes in revised Rule 976 are an elaboration of criteria for publication and a different procedure for publication. Under the rule as adopted in 1964, an appellate court certified a case for nonpublication when the criteria were not met. Now, a majority of the court must affirmatively find that the criteria are met, and certify the decision for publication.

decisions. After a review of the efforts by the courts and the profession to curtail the volume of published opinions and the inconsistencies arising since the adopting of Rule 976, this article concludes that, with certain limited exceptions,[5] sound judicial policy requires that unreported decisions be given neither binding nor persuasive effect, and that any citation to such decisions should be precluded.

History

Though the main concern of this article is the use which the profession and the courts should make of unreported cases, it is important to understand the historical developments which led to the adoption of Rule 976. The rule is the result of the merger of two independent, yet related, subjects, each of which had its origin in the early days of the state. One concerns the requirement making opinions a matter of written record; the other involves publication of these opinions.

Requirement for Written Opinions

The requirement for written opinions is constitutional, not statutory.[6] The Constitution of 1849 did not require that judicial opinions be written.[7] In 1854, however, the legislature amended the Civil Proceedings Act of 1851[8] so that

> [a]ll decisions given upon an appeal in any appellant court of this State, shall be given in writing, with the reason therefor, and filed with the clerk of the court, but this section shall not apply to actions tried with a jury anew in the county court, or on appeal from a justice's court.[9]

This provision was declared unconstitutional by the supreme court in *Houston v. Williams* in 1859. Justice Stephen J. Field characterized the provision as "but one of many provisions embodied in different statutes by which control of the Judiciary Department of the government has been attempted by legislation."[10] In stating the court's absolute authority to decide whether an opinion shall be oral or written, Jus-

5. An unreported case should, of course, have full effect when it represents the law of the case, where it is res judicata or collateral estoppel against a party to the action, or where it is relevant to punishment or sentence in a criminal or disciplinary proceeding.

6. See text accompanying notes 7-12 *infra*.

7. CAL. CONST. art. VI (1849).

8. Cal. Stat. 1851, ch. 5, at 51.

9. Cal. Stat. 1854, ch. 54, § 69 at 72.

10. Houston v. Williams, 13 Cal. 24, 25 (1859).

tice Field relied on reasons which the proponents of Rule 976 would urge one hundred years later in seeking to limit the publication of appellate court opinions. Justice Field felt that such a broad requirement of written opinions would detract from judges' time, produce an unmanageable volume of authority, and require unnecessary restatements of settled points of law.[11] Not only the wisdom, but also the authority of the legislature was attacked by the justice. It was entirely within the discretion of the judiciary, he felt, to determine when a written opinion was necessary.[12]

Notwithstanding Justice Field's contentions, the Constitution Convention of 1879 adopted the following provision:

> In the determination of causes, all decisions of the [supreme] court in bank or in departments, shall be given in writing, and the grounds of the decision shall be stated.[13]

Apparently, the argument supporting the proposal was so effective that it was accepted without debate.[14] In support of the provision, it was argued that written opinions (1) are valuable as precedent; (2) are necessary in subsequent litigation in the same action; and (3) are promotive of well reasoned opinions.[15] In 1904, a similar requirement was placed on the newly created district courts of appeal.[16]

When the appellate departments of the superior courts were formed in 1929, no constitutional requirement was made for written opinions,[17] and, by a subsequently adopted rule of court,

> [t]he judges of the Appellate Departments [should] not write opinions except in such cases as they may deem it advisable to guide the lower court where a cause is returned for a new trial, and except in cases where the public interest justifies.[18]

Thus, where the California constitution failed to mandate written opin-

11. *Id.* at 26.

12. *Id.*

13. CAL. CONST. art. VI, § 2 (1879).

14. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 950 (1880) [hereinafter cited as DEBATES & PROCEEDINGS]; Radin, *The Requirement of Written Opinions*, 18 CALIF. L. REV. 486, 488 (1930).

15. 2 DEBATES & PROCEEDINGS, *supra* note 14, at 950, 951 (remarks of Samuel M. Wilson).

16. CAL. CONST. art. VI, § 24 (1904). The section read, in part, as follows: "In the determination of causes all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and the grounds of the decision shall be stated."

17. Cal. Stat. 1929, ch. 475, at 836 (repealed 1953). For present authorization of appellate department, see CAL. CODE CIV. PROC. § 77 (West Supp. 1972).

18. Cal. R. App. Dep't. Super. Ct. 6, 213 Cal. cvii (1932), *as modified*, CAL. R. CT. 106.

ions, the courts, in their rule-making capacity, heeded Justice Field's words.[19]

The judicial recognition, evidenced by this rule, of the need to restrict written opinions carried over into the California Judicial Council. The requirement for such opinions was repeatedly considered. In 1929 —the same year that the appellate departments were created—an amendment destined to die in committee was proposed. This proposal would have required written opinions only in the following situations:

> Where the cause is one in which there is drawn in question the validity of a statute of this state on the ground of its being repugnant to the constitution, or laws of the United States, or the constitution of this state, or where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution or any statute of this state, or where there is drawn in question the construction of the constitution or a statute of the United States or of this state, or which involves a question of state-wide moment, the grounds of the decision shall be stated.[20]

Having lost its bid for an amendment curtailing written opinions, the council invited members of the state bar to study the problem. The resultant studies lasted throughout the 1930s.[21] Since the sentiments of the bar concerning the curtailment of written opinions are directly applicable to present day selective reporting of decisions, these sentiments will be considered in some detail.

In 1930 the Committee on the Administration of Justice recommended adoption of the New York approach where

> [w]ritten opinions are filed only in cases involving a reversal or modification; or where a constitutional question is involved; or where the interpretation of a statute not already passed on is involved; or in any case of general public interest.[22]

In New York, such an approach had led to approximately three-fourths of the decisions being made without written opinions.[23] State

19. See text accompanying note 11 *supra.*

20. CAL. JUDICIAL COUNCIL SECOND BIENNIAL REP. 101 (1929).

21. McLaughlin, *Birth Control of Written Opinions,* 9 CAL. ST. B.J., PT. II, 246 (1934); McWilliams, *Opinions, Written and Unwritten,* 11 CAL. ST. B.J. 47-48 (1936); Saeta, *What Price Written Opinions!,* 9 CAL. ST. B.J. 222 (1934); Sieman, *Proposed Revision of the Judiciary Article of the California Constitution,* 8 CAL. ST. B.J. 216 (1933); State Bar of California, Committee on the Administration of Justice, *Main Problems Presented For Study with Reference to Proposed Reform of Appellate Procedure,* 12 CAL. ST. B.J. 249, 255 (1937); State Bar of California, Sub-Committee on the Publication of the Official Law Reports and the Advance Sheets, *Report,* 10 CAL. ST. B.J., PT. II, 16 (1935); Section Departments, 4 CAL. ST. B.J. 250-54, 275-79 (1930), 5 CAL. ST. B.J. 297-300, 313-15, 340-41 (1930), 7 CAL. ST. B.J. 145-46, 245-46 (1932).

22. Section Departments, 4 CAL. ST. B.J. 275, 277 (1930).

23. *Id.*

Bar Association President Charles Beardsley, recognizing the validity of the committee's recommendation, endorsed modification of the constitutional rule mandating appellate courts to state in writing the reasons for their decisions in all cases. The rationale for his endorsement was that

> [o]ften [written opinions] are neither of interest nor of importance to anybody. But all of them must be written and filed before litigation can reach its destination. While all this is going on the progress of the whole volume of litigation thru [*sic*] the appellate courts is held up and delayed for years in reaching its destination, namely, a final judgment.[24]

Despite the state bar committee's position favoring the reduction of written opinions and the president's endorsement, it appears that some local administrative committees and local bar associations were strongly opposed to the idea.[25] For example, the State Bar Journal reported that the Plumas County Bar feared that without written opinions, the bar would be denied useful precedents. The Plumas County group felt that the problem of voluminous reports could be sufficiently met by production of shorter opinions.[26]

Four years later, Maurice Saeta vigorously supported the state bar committee's proposal, arguing that the vast majority of written opinions merely rehashed unquestioned points of law.[27] Saeta quoted Justice McReynolds of the United States Supreme Court in vigorous support of this contention:

> In my view, multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths (maybe nine-tenths) of those published in the last twenty years were utterly destroyed. Thousands of barren dissertations have brought confusion, and often contempt. . . . Hurried opinions and long dictated ones, when not laboriously revised, generally, have no proper place except in the wastebasket.[28]

Echoing this sentiment was the Report of the Sub-Committee on Courts and Judicial Officers, which concluded: "This Committee believes that appellate decisions having no permanent value should be handled as memorandum opinions, *and not officially published as 'precedent.'* "[29] On the other hand, one writer attacked the proposed reduction of written opinions contending that a judge

24. Beardsley, *A Message from the President: Why Not Break the Bottle's Neck?*, 4 CAL. ST. B.J. 246, 247 (1930).

25. Section Department, 4 CAL. ST. B.J. 275, 278 (1930).

26. *Id.* at 279.

27. Saeta, *supra* note 21.

28. *Id.* at 222.

29. State Bar of California, Sub-Committee on Courts and Judicial Officers, *Report*, 9 CAL. ST. B.J. PT. II 46-47 (1934) (emphasis added).

> would not give the cases in which he wrote no opinion the same careful consideration which he gives to the cases where his opinion will be perpetually subject to the scrutiny of judges, professors, legal writers, and of the legal profession in general.[30]

Finally, in 1937, the conflict over the efficacy of the requirements for written opinions ended. The Committee on the Administration of Justice recommended that the study of curtailing *written* opinions be postponed until after the passage of Assembly Constitutional Amendment 30, dealing with the restructuring of the appellate courts.[31] Apparently, the problem was not considered again until the early 1960s. Then, it was considered only in the form of the curtailment of *published* opinions.

Publication of Decisions

The California Constitution of 1849 required the legislature to provide for the speedy publication of such judicial opinions as it may deem expedient.[32] The following year this requirement was implemented by two statutes which directed that all decisions of the supreme court be reported.[33] Since at that time the constitution did not require judicial opinions to be written,[34] the reporter of the supreme court was directed to prepare an abstract of every oral decision rendered by a justice in a case.[35] Reflecting the court's holding in *Houston v. Williams*,[36] the 1860 statutory changes directed the reporter of the supreme court to report only those cases selected by the court.[37] The Political Code of 1872 continued this provision.[38]

30. McLaughlin, *supra* note 21, at 246.
31. Committee on Administration of Justice, *supra* note 21, at 255.
32. CAL. CONST. art. VI, § 12 (1849).
33. Cal. Stat. 1850, ch. 90, § 2, at 216; Cal. Stat. 1850, ch. 26, § 2, at 83.
34. CAL. CONST. art. VI (1849).
35. Cal. Stat. 1850, ch. 90, § 2 at 216.
36. See text accompanying notes 10-12 *supra*.
37. Cal. Stat. 1860, ch. 132, §§ 1, 2, at 104 (repealed 1955): "Section 1. It shall be the duty of the Reporter of the Supreme Court, to prepare in an exact and accurate manner, a report of all such cases decided by said court, as he may be directed to report by the court. Each report shall include . . . the opinion or opinions of the court, subject to the supervision and correction of the said Justices . . . *provided*, that such opinions and decisions as the Judges shall deem unnecessary to report, shall be so indorsed by the Justice delivering them, before the filing thereof in the Clerk's office of said court.

"Section 2. The reports shall be published in well bound volumes . . . and the Justices of the Supreme Court are required to see that reports do not contain matter unnecessary to be reported, or improperly increasing the number of said volumes."
38. Cal. Pol. Code § 771 (Enacted March 12, 1872) (now CAL. GOV'T CODE § 68902 (West Supp. 1972)).

While the 1849 constitution clearly stated that the legislature would designate which opinions would be published,[39] an amendment to the constitution in 1862[40] and that amendment's retention in the constitution of 1879[41] created uncertainty. The amendment required "the Legislature [to] provide for the speedy publication of such opinions of the supreme court as it may deem expedient . . . ." Confusion centered on whether the word "it" referred to the legislature or the court. Despite the language of the Political Code of 1872,[42] the stronger argument is that "it" referred to the legislature.[43] This ambiguity, however, was eliminated by constitutional amendment in 1904 when the district courts of appeal were created. Henceforth, the supreme court would determine which appellate opinions the legislature would publish.[44]

In 1909, the legislature adopted a statute requiring all filed decisions to be published.[45] The validity of this provision may be questioned when considered against the 1904 constitutional amendment mentioned above.[46] Nevertheless, from 1909 until the adoption of Rule 976 in 1963, all the decisions of the supreme court and the courts of appeal were officially reported. Earlier, between 1859 and 1909 a number of supreme court and, later, district courts of appeal decisions were not reported.[47] A list of these unreported cases appeared in most volumes of the official reports[48] with the notation in some early volumes that the cases were not "of sufficient importance to re-

39. CAL. CONST. art. VI, § 12 (1849).

40. CAL. CONST. art. VI, § 14 (1862).

41. CAL. CONST. art. VI, § 16 (1879).

42. See text accompanying note 38 *supra.*

43. Strauss, *Written Opinions,* 39 CAL. ST. B.J. 127, 130 (1964).

44. CAL. CONST. art. VI, § 16 (1904): "The Legislature shall provide for the speedy publication of such opinions of the Supreme Court and of the district courts of appeal as the Supreme Court may deem expedient, and all opinions shall be free for publication by any person."

45. Cal. Stat. 1909, ch. 678, § 1, at 1022, *amending* Cal. Pol. Code § 774 (Enacted March 12, 1872) (now CAL. GOV'T CODE § 68902 (West Supp. 1972)). After the 1909 amendment, the provision read in part as follows: "The reports are to be published under the general supervision of the supreme court, which may correct clerical errors in the opinion as filed, or authorize the same to be corrected; but may not in any manner alter the written opinion as to substance, argument or authority cited, or omit any portion of the opinion as filed. All opinions filed must be printed in full in the law reports."

46. Strauss, *supra* note 43, at 131.

47. In reliance on Cal. Stat. 1860 ch. 132, §§ 1, 2, at 104 (repealed 1955), the Supreme Court no doubt deemed these decisions "unnecessary" to report and directed that they not be published.

48. Cal. volumes 13 to 155; Cal. App. volumes 1 to 10.

port"[49] or not "worth reporting."[50] In 1913, these unpublished opintions were privately printed in a series entitled "California Unreported Cases." The use of these cases as precedent is discussed below.[51]

Preparatory to the adoption of Rule 976, the code section[52] requiring all decisions filed to be published was amended[53] to reflect the constitutional prerogative of the supreme court to designate which opinions would be reported. In 1966, the constitutional provisions for written opinions and for publication of judicial opinions which were previously contained in sections 2, 16, and 24 of Article VI were combined in section 14 of that Article:

> The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and Courts of Appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.
>
> Decisions of the Supreme Court and Courts of Appeal that determine causes shall be in writing with reasons stated.

The Adoption of Rule 976

By 1960, the total number of reported cases in the United States was two and a half million.[54] The State Bar Committee on Legal Publications and Decisions reported in 1962 that unless the number of reported cases was drastically reduced, the efficiency of the judiciary would be seriously impaired and the reason and usefulness of our system of precedent would be destroyed.[55] Among the reasons advanced by the committee were that the ordinary practitioner could not afford an adequate library,[56] that each year the public would spend millions of dollars for the maintenance of public law libraries,[57] that countless

49. *E.g.*, 13 Cal. 650 (1859).

50. *E.g.*, 15 Cal. 741, 750 (1860) (Index).

51. See text accompanying notes 90-98 *infra.*

52. Cal. Stat. 1953, ch. 206, § 1, at 1247 (repealed 1963) *formerly* Cal. Pol. Code § 774 (Enacted March 12, 1872).

53. Cal. Stat. 1963, ch. 1353, § 1, at 2881 (now CAL. GOV'T CODE § 68902 (West Supp. 1972)).

54. Prince, *Law Books, Unlimited*, 48 A.B.A.J. 134 (1962):

REPORTED DECISIONS

Period	Reported Decisions
1790-1840	50,000
1840-1890	450,000
1890-1940	1,250,000
1940-1960	600,000-700,000 (estimate)

55. State Bar of California, Committee on Legal Publications and Decisions, *Report*, 37 CAL. ST. B.J. 371, 372 (1962).

56. *Id.* at 372.

57. *Id.*

hours would be spent by the courts and the profession researching useless volumes of case law,[58] and that a large number of opinions would have no precedential value.[59] The following year, the Judicial Council endorsed the position of the committee and urged the adoption of a rule limiting the number of published opinions.[60]

As originally adopted,[61] Rule 976 provided that all opinions of the supreme court would be published, as would those of lower appellate courts which involved a new and important issue of law, a change in an established principle of law, or a matter of general public interest. Even though every district court of appeal opinion was deemed to meet the standard for publication unless a majority of the court rendering the opinion certified the opinion for non-publication, opinions of the appellate department of the superior court would not be published unless two of the judges joining in the opinion certified that it complied with the standard.

These standards were made even more stringent on January 1, 1972. Under the present version of the rule, all opinions of the supreme court continue to be published. However, opinions of the courts of appeal and of the appellate department of the superior court will be published only if they (1) establish a new rule of law, or alter or modify an existing rule of law, (2) involve a legal issue of continuing public interest, or (3) criticize existing law. The official explanatory footnotes to the rule must be considered in conjunction with the above criteria.[62] For example, the footnote to the first criterion explains that "a fact case of first impression where a legal rule or principle is applied to a substantially new factual situation"[63] does not justify publication. In addition, instead of certifying opinions for *non-publication*, the courts of appeal must now certify opinions for *publication*. The certification procedure in the appellate department of the superior court remains unchanged from the former version.[64] Under both the original and amended rule, opinions superseded by the granting of a hearing or rehearing are not officially published.[65]

58. *Id.*
59. *Id.* at 371, 372.
60. CAL. JUD. COUNCIL, NINETEENTH BIENNIAL REP. 21, 22 (1963).
61. See note 4 *supra.*
62. For the full text of the explanatory footnotes, see note 4 *supra.*
63. *Id.*
64. See text accompanying note 61 *supra.*
65. CAL. R. CT. 976(e), 60 Cal. 2d 1 (1963) (renumbered CAL. R. CT. 976(d)). Despite the Supreme Court's direction that superseded opinions shall not appear in the Official Reports, the West Publishing Company reports these opinions in California Reporter.

Citation of Unreported Cases

Out of the above history, there arises the issue of the efficacy of citing unreported cases—both by the bar and the courts. Prior to the adoption of Rule 976, the appellate courts not only permitted citation of unreported cases by counsel, but the courts also considered these cases to be as binding as officially reported cases.[66] In *MacDonald v. MacDonald*,[67] the California Supreme Court, finding an unreported case directly in point, stated:

> The fact that this case was not ordered reported in the official reports cannot be taken to indicate, as claimed by the defendant, that this court disapproved the doctrine announced therein. We are satisfied that the decision there given on this point was correct.[68]

In *People v. Pantages*,[69] the supreme court again referred to an unreported case terming it a "leading case"[70] and followed its holding.

The courts of appeal were no less reluctant in accepting unreported cases as authority.[71] In *Estate of Little*,[72] Justice (then Judge) McComb quoted extensively from an unreported 1909 supreme court case. In answer to the appellant's contention that the earlier case was not binding because it did not appear in the official reports of the supreme court, Justice McComb noted that

> [t]his case has never been overruled and is therefore binding upon this court. The fact that this case was not ordered reported in the official report of the Supreme Court does not detract from its binding force.[73]

In *Overton v. White*,[74] the court of appeal was cited to an unreported case as the only case in point on the sufficiency of a particular form of pleading. The court found that the unreported case was indistinguishable in principle from the instant case, and since it had not been overruled or modified, the court felt compelled to follow its holding. Unpublished decisions of the appellate department of the su-

66. This is particularly interesting since these opinions were not reported because they were supposedly "unnecessary," not "of sufficient importance to report," or not "worth reporting." See text accompanying notes 47, 49, and 50 *supra*.

67. 155 Cal. 665, 102 P. 927 (1909).

68. *Id.* at 672, 102 P. at 930.

69. 212 Cal. 237, 297 P. 890 (1931).

70. *Id.* at 255-56, 297 P. 890 at 898-99.

71. In addition to the cases discussed, *see* Citizens Nat'l Trust & Savings Bank v. Brown, 54 Cal. App. 2d 688, 692, 129 P.2d 466, 468 (1942); Brazell v. Brazell, 54 Cal. App. 2d 458, 460, 129 P.2d 117, 118 (1942).

72. 23 Cal. App. 2d 40, 72 P.2d 213 (1937).

73. *Id.* at 43, 72 P.2d 213, 215.

74. 18 Cal. App. 2d 567, 571, 574, 64 P.2d 758, 759 (1937).

perior court were also occasionally cited by counsel and were followed by appellate departments and courts of appeal.[75]

Since the adoption of Rule 976, the Supreme Court of California apparently has spoken only once on the subject of the citation of unreported cases. In denying the petition for hearing in *People v. Bowling*, the supreme court recently stated:

> The Reporter of Decisions is directed not to publish the opinion in the above entitled appeals . . . *for the reason it cites an unpublished opinion.* (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.) McComb, J., and Peters, J., do not concur in the order for nonpublication.[76]

This brief reference is hardly dispositive of the legality of citing unreported cases. The very least that can be said is that no published opinion shall contain a citation to an unreported case. Whether it also means that counsel is precluded from citing, and the court from considering, an unreported case is another matter.

In recent months the supreme court has adopted the practice of denying a petition for hearing and, additionally, directing the Reporter of Decisions not to publish the lower court opinion.[77] It should be noted that the opinion had previously been certified as meeting the standard for publication by at least two judges of the court of appeal. In countermanding the certification, the supreme court has offered no explanation for its action. Though it is possible that the appellate opinion did not meet the required standard, the authors surmise that the reason for the direction not to publish is that the supreme court, while approving the result, disagreed with or had reservations about the

75. In re Martin, 221 Cal. App. 2d 14, 18, 34 Cal. Rptr. 299, 301 (1963); Slosberg v. Municipal Court, 101 Cal. App. 2d 238, 240, 241, 225 P.2d 312, 313 (1950); Saldana v. Los Angeles, 92 Cal. App. 2d 214, 217, 206 P.2d 866, 868 (1949); In re Mares, 75 Cal. App. 2d 798, 802, 171 P.2d 762, 765 (1946); People v. Stipp, 190 Cal. App. 2d 883, 885, 12 Cal. Rptr. 476, 477 (Super. Ct. App. Div. (1961); Englemen v. Green, 125 Cal. App. 2d 882, 886, 270 P.2d 127, 129 (Super. Ct. App. Div. 1954); Gibson v. Corbett, 87 Cal. App. 2d 926, 928, 200 P.2d 216, 217 (Super. Ct. App. Div. 1954).

76. 2d Crim. No. 21296 (Sup. Ct. Cal., filed May 3, 1972) in The Recorder, May 8, 1972, at 6, 7 (emphasis added).

77. People v. Gershon, 2d Crim. No. 20614 (Sup. Ct. Cal., filed May 23, 1972), in The Recorder, May 26, 1972, at 2; People v. Superior Court, 2d Civ. No. 39335 (Sup. Ct. Cal. filed May 23, 1972), in 92 The Recorder, May 26, 1972, at 2; People v. Eddy, 2d Crim. No. 20755 (Sup. Ct. Cal., filed May 18, 1972), in 92 The Recorder, May 22, 1972, at 7; Southern Pac. R.R. v. General Accident Fire and Assurance Corp., 1st Civ. No. 28811 (Sup. Ct. Cal., filed May 10, 1972, in The Recorder, May 12, 1972, at 3; People v. Wakeland, 3rd Crim. No. 6245 (Sup. Ct. Cal., filed May 10, 1972), in The Recorder, May 12, 1972, at 10.

reasoning for the decision and chose this course of action to remove the opinion as precedent.

To correct the aberration, the supreme court would have had to grant a hearing and render an opinion of its own, correcting the error without changing the result. Perhaps, in the interest of judicial efficiency, the court was attempting to say that justice had been done and the defect in the lower court opinion would not be perpetuated for all time by publication. Implicit in this conjecture is the notion that the court considers an unreported case to be a judicial non-entity—unavailable for citation by counsel or consideration by the court. This view finds support in a speech of former Chief Justice Roger Traynor to the University of Pennsylvania Law School: "[In 1963] the California Supreme Court . . . adopted a rule limiting the publication of opinions by district courts of appeal to those deemed of value as precedents by whatever court issues them."[78]

In the absence of a definitive statement by the supreme court, it is not surprising that various courts of appeal have adopted divergent approaches to the problem. In *Web Service Co. v. County of Los Angeles*,[79] Division One of the Second District Court of Appeal quoted extensively from the trial court's memorandum decision which contained the following statement:

> Since the foregoing was written, decisions have been filed in the Leach Corporation and Shonborn cases . . . . The opinion in Leach . . . answers adversely practically every contention of plaintiffs herein as to the . . . rejection of evidence. The Shonborn opinion having been certified for non-publication may not under Rule 976 be cited but it too is adverse to plaintiffs' contentions.[80]

Despite its position on unreported cases, the trial court in *Web* commented on an inter-departmental communication from an assistant attorney general to the Secretary of the State Board of Equalization: "The fact that this is not a published opinion does not detract from its logic."[81]

Two years after *Web*, Division One of the First Appellate District, in *People v. Garner*,[82] cited *People v. Otwell*,[83] an unreported

78. Owen J. Roberts Memorial Lecture by Chief Justice Traynor, University of Pennsylvania Law School, Nov. 12, 1964, printed as *The Unguarded Affair of the Semikempt Mistress*, 113 U. PA. L. REV. 485, 504 (1965).

79. 242 Cal. App. 2d 1, 51 Cal. Rptr. 753 (1966).

80. *Id.* at 6-7, 51 Cal. Rptr. 753, 756-57.

81. Quoted in *id.* at 10, 51 Cal. Rptr. 753, 759.

82. 258 Cal. App. 2d 420, 427, 65 Cal. Rptr. 780, 785 (1968).

83. 61 Cal. Rptr. 427 (1967).

case, in support of its holding. On the other hand, in *People v. Cobb*,[84] Division Two of the Second District indicated that it would ordinarily be improper for counsel to refer to and for the court to quote from an unpublished opinion of the court of appeal under Rule 976(e)[85] of the Rules of Court. This subsection deals with superseded opinions which have never been accorded value as precedents, and it is highly doubtful that it supports the court's conclusion. Finally, since the adoption of the rule, the appellate departments of superior courts have, on occasion, continued to cite unreported cases.[86]

Unreported Cases and Stare Decisis

In a common law jurisdiction, appellate decisions have two major functions. One is the resolution of disputes. With respect to this function, judicial opinions serve to explain the outcome of the case to the parties and their counsel.

> The other principal function of appellate decisions under our system is to establish the law itself, to determine what the content of the law shall be. This is the function of common law precedent, and of the rule of *stare decisis*.[87]

In California, the decisions of the supreme court are binding on all lower courts. While one district or division of a court of appeal may refuse to follow a decision of a different district or division, intermediate appellate decisions are binding on the trial courts and on the appellate departments of the superior courts.[88]

The principle of *stare decisis* has the supposed effect of preventing unnecessary litigation, in that persons would not seek to litigate settled points of law. Where decisions involving minor factual distinctions are deemed to add nothing to settled law, they are not published. Thus, it is possible that failure to perceive a precise factual situation in the reports will encourage counsel to litigate, thereby bringing more cases to the appellate courts.[89] On the other hand, if the status of precedent is accorded to every decision, reported or not, the rule of *stare decisis* is in danger of drowning in a vast sea of paper.

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84. 15 Cal. App. 3d 1, 3, 93 Cal. Rptr. 153, 154 (1971).

85. This subsection is now CAL. R. CT. 976(d).

86. Buckner v. Azulai, 251 Cal. App. 2d 1013, 1014-15, 59 Cal. Rptr. 806, 807 (Super. Ct. App. Div. 1967); People v. Dudley, 250 Cal. App. 2d 955, 957, 58 Cal. Rptr. 557 (Super. Ct. App. Div. 1967).

87. Leflar, *Sources of Judge-made Law*, 24 OKLA. L. REV. 319 (1971).

88. 6 B. WITKIN, CALIFORNIA PROCEDURE §§ 664, 666-67 (2d ed. 1971).

89. Note, *Selective Publication of Case Law*, 39 S. CAL. L. REV. 608, 610 (1966).

The Citation of Unreported Cases: A Proposal

Few people, if any, would contend that the citation of an unpublished opinion as precedent is improper where the opinion is the law of the case, where it is res judicata or collateral estoppel against a party to the action, or where it is relevant to punishment or sentence in a criminal or disciplinary proceeding. Outside of these limited situations, however, the argument for the use of unreported cases as precedent falters. This is because judicial economy requires a halt to the trend towards an unmanageable volume of authority and unnecessary restatements of settled points of law.[90] Judicial economy also demands that the supreme court have a means to prevent poorly reasoned but correctly decided appellate opinions from becoming part of our system of precedent without having to render its own opinion.[91] The value of the use of unreported opinions must be weighed against the financial realities confronting the practitioner and the public in maintaining law libraries,[92] as well as the wasted hours expended by the courts and the bar in researching useless volumes of case law.[93] Such a balancing militates against the use of unreported cases as precedent.[94]

Additionally, there are other factors which lead to the conclusion that unreported cases should have no more than limited use.[95]

90. See text accompanying note 11 *supra.*

91. See text accompanying notes 77-78 *supra.*

92. See text accompanying notes 56-57 *supra.*

93. See text accompanying note 58 *supra.*

94. The State of Washington has considered the problem of the selective publication of appellate opinions. By statute the legislature has directed each appellate court panel to determine which opinions have sufficient precedential value to be published as opinions of the court. Wash. Laws. ch. 41, § 1 (1971), *amending* Wash. Revised Code 2.06.040. Thus, any doubt as to the status of unreported cases has been removed—they are not precedents. See State v. Fitzpatrick, 5 Wash. App. 661, —, 491 P.2d 262, 267 (1971) (illustrating one panel's approach to determining which of its opinions shall be published).

95. While the authors feel that the best solution is to preclude any citation of unreported opinions, other approaches are arguable. One such suggestion is not that the court be required to accept the cited cases as precedent, but that it be free to consider the merits of the unpublished opinion, and to adopt it as its own if the court finds the decision persuasive.

This approach would tend to minimize some of the objections to the use of unreported cases. Private publishers might think twice before publishing a new series of unreported cases if those cases lacked precedential value. Since only the reasoning of the unreported case, not the case itself, would appear in the adopting court's opinion, the inability to "Shepardize" the unreported case is rendered less important. Previously, it was argued that, if unreported cases were accorded precedential value, the solo practitioner would be at a serious disadvantage *vis-a-vis* many larger firms which maintain a file of unreported opinions and a stable of research-eager associates

These factors are grounded in fairness, reliability and efficiency. It is unfair to allow counsel who has special knowledge of an unpublished opinion to use it or not depending on whether it is favorable to his position. Obviously, he will not use it where it is unfavorable. Thus, the party who does not have access to the opinion is placed at a disadvantage.

In addition to this fundamental unfairness, there is another fairness argument which supports the conclusion that unreported cases should not be used. Various professional organizations may collect such opinions and disseminate information regarding them to their members. This information would not be available to attorneys who were not members of such organizations.

The reliability of unreported cases is questionable. Since they do not appear in Shepard's Citations, the bench and bar will have great difficulty knowing whether they have been overruled, modified, followed or distinguished. The use of such "authority" is highly dubious. Moreover, some enterprising entrepreneur may publish a new series of "California Unreported Cases." If this is done, we have lost the benefit of Rule 976.

In addition to arguments of fairness and reliability militating against the use of unreported cases, lawyer and judicial efficiency must be considered. One of the reasons for adopting Rule 976 was to cut down on the vast volume of judicial opinions of which the practic-

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and clerks. This argument loses some of its strength if unpublished opinions are not precedents. If these cases were only persuasive, attorneys would not feel so constrained to read through every opinion filed. It is possible that efficiency in the administration of justice would conceivably be served by retaining and utilizing the fruits of judicial labor.

One objection which would remain despite this proposal is the cry of "surprise" from the lips of opposing counsel when an unreported case is cited to the court. This concern might be alleviated by the adoption of a supplemental rule requiring that a copy of the unpublished opinion be furnished opposing counsel in advance of its citation to the court. The courts, today, look to many sources in arriving at their decisions. In addition to what is found in judicial opinions, they consider the writings of legal scholars, the restatements of law, and articles in legal periodicals, including the notes and comments produced by law students. This approach would accord the same weight to unreported opinions.

One principal difficulty with this proposal is that it tends to defeat the purpose of Rule 976. Moreover, this alternative would still allow counsel the option of making use of a decision of which he has special knowledge depending on whether it happens to be favorable or not. Even though the case may not be precedent, still the lawyer who has a case "in point" may have a distinct, and unfair, advantage over his opponent, who may not have the resources available to the practitioner who is fortunate enough to have possession of the unreported decision.

ing lawyer was required to keep abreast. If counsel may nevertheless cite unpublished opinions, the cautious practitioner is required to be familiar with such opinions and at least skim them when they are issued.

Judicial efficiency requires that disputes be settled economically and rapidly. The use of unreported cases works against these goals. If a trial court refuses to follow an unpublished opinion, this will precipitate an appeal with all of its attendant expense and delay. As previously noted, an unpublished opinion does not have sufficient exposure to the bench and bar to warrant its use by counsel. The purpose of such an opinion is simply to determine whether or not the trial court reached the right result as between the parties and to advise them of the basis for the decision. It should not demand the same attention in drafting by the authors of the opinion as they would give if they felt that it met the standards required by Rule 976.

The function of the appellate courts to review the trial court's decision for correctness should be handled in a manner which provides faster, cheaper, and better justice.[96] The use of unpublished opinions works against that goal.

Considering judicial economy, the preservation of *stare decisis* as a workable doctrine, fairness, reliability and efficiency, the authors urge that the citation of unreported cases be precluded except in those limited situations where the prior opinion involves a party to the action.[97] This can be accomplished by the California Supreme Court's adopting such a rule.[98] In addition to a rule of court precluding the citation of unreported cases, there would be a necessity to prevent such

96. State Bar of California, Special Committee re Appellate Courts, *The Court of Review: A New Court for California*, 47 CAL. ST. B.J. 28, 30 (1972).

97. See note 5 *supra*.

98. The California supreme court has held: "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this Court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. . . ." Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455, 369 P.2d 937, 939-40, 20 Cal. Rptr. 321, 323-24 (1962). In view of this decision and the need for a definitive statement that unpublished opinions are not controlling authority in lower courts and the fact that rule 976 was adopted by the supreme court, the rule restricting the precedential value of unpublished opinions and precluding their citation must be adopted by the supreme court rather than the judicial council or the legislature. Problems regarding judicial notice, however, must be resolved by the legislature.

cases from sneaking in the back door through the use of judicial notice of unpublished opinions as precedent. The legislature should accordingly enact a statute which would preclude evasion of this rule through judicial notice under Evidence Code sections 451 and 459. If this is accomplished, both the bench and the bar will have assurance that the vast sea of unreported cases pouring out of the appellate courts may be properly ignored except by persons directly involved in the litigation.